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No. 00-38

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

KIM HO MA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of certain aliens, including those who have been convicted of an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released, and the alien's custody is subject to periodic administrative review.

PARTIES TO THE PROCEEDINGS

Petitioners are the Attorney General of the United States, the Immigration and Naturalization Service (INS), and the INS Acting District Director in Seattle, Washington. The three petitioners were named as respondents in the district court and were appellants in the court of appeals. Respondent is Kim Ho Ma, who brought the instant petition for a writ of habeas corpus in the district court and was appellee in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 208 F.3d 815. The July 9, 1999, joint order of five district court judges in this case and four other cases (Pet. App. 34a-51a) is reported at 56 F. Supp. 2d 1149. The July 13, 1999, opinion of the district court ordering an evidentiary hearing in respondent's case (Pet. App. 52a-54a) is reported at 56 F. Supp. 2d 1165. The September 29, 1999, opinion of the district court granting respondent habeas corpus relief (Pet. App. 55a-61a) is unreported. The June 2, 1999, custody decision by the Immigration and Naturalization Service (INS) District Director and the underlying May 6, 1999, custody review report (Pet. App. 77a-86a) are unreported. The September 29, 1999, custody decision of the INS headquarters review committee (Pet. App. 87a-89a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2000. A petition for rehearing was denied on

June 2, 2000 (Pet. App. 62a-63a). The petition for a writ of certiorari was filed on July 5, 2000, and was granted on October 10, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 1231(a) of Title 8 of the United States Code is set forth in relevant part at App., *infra*, 3a-6a.

2. The regulations of the INS that currently govern the detention of aliens beyond the 90-day removal period, 8 C.F.R. 241.4, are set forth at Pet. App. 90a-91a.

3. The February 3, 1999, memorandum from the Executive Associate Commissioner of the INS to INS Regional Directors, entitled "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," is set forth at Pet. App. 64a-68a. The August 6, 1999, memorandum from the Executive Associate Commissioner of the INS to INS Regional Directors entitled "Interim Changes and Instructions for Conduct of Post-order Custody Reviews," is set forth at Pet. App. 69a-76a.

STATEMENT

1. a. Respondent is a native and citizen of Cambodia who entered the United States as a refugee in 1985 and became a lawful permanent resident in 1987. Pet. App. 56a. In 1996, respondent was convicted in state court of first degree manslaughter after he, along with four other gang members, "ambushed and shot a fellow gang member" in April of 1995. *Ibid.*; J.A. 54; A.R. 144.[1] The five gang members drove up to a parking lot together in a car; two of them got out with guns and opened fire on the targeted gang member. A.R. 144-145. The

[1] A.R. refers to the certified Administrative Record filed by the INS in the district court. See J.A. 3.

shooters then returned to the car and the five gang members attempted to escape, but were apprehended by police after a chase. A.R. 144-146. Respondent was sentenced to three years and two months' imprisonment. Pet. App. 60a n.4.

b. On June 6, 1997, respondent was released from state custody and, pursuant to a detainer previously lodged by the Immigration and Naturalization Service (INS), was transferred to INS custody and ordered detained. A.R. 48, 194, 249. On July 3, 1997, the INS issued respondent a notice to appear, charging him with being subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) because he had been convicted of an "aggravated felony," which includes a crime of violence for which the term of imprisonment imposed was one year or more, see 8 U.S.C. 1101(a)(43)(F) (Supp. IV 1998). A.R. 36, 186.

On September 12, 1997, an immigration judge found that respondent was subject to removal as charged and was ineligible for asylum and withholding of removal under 8 U.S.C. 1158 and 1231(b)(3) (Supp. IV 1998). J.A. 26-32. Respondent appealed that ruling to the Board of Immigration Appeals (Board), which denied relief. J.A. 44-56. In an opinion dated October 26, 1998, the Board agreed that respondent was subject to removal under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) as an aggravated felon. J.A. 44-46. The Board further held that respondent was ineligible for withholding of removal under 8 U.S.C. 1231(b)(3)(B)(ii) (Supp. IV 1998), which precludes such relief if "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." See J.A. 47. The Board agreed with the immigration judge that respondent's conviction for participating in "a gang related violent ambush resulting in the death of [the] victim constitutes a

particularly serious crime" (J.A. 54), noting, *inter alia*, that he "received almost the maximum sentence that could be ordered based on his criminal record" (J.A. 52-53).

c. During the pendency of his removal proceedings, respondent twice requested redetermination of the denial of his request for release on bond. On October 7, 1997 (J.A. 33-37), and December 31, 1997 (J.A. 38-43), the immigration judge denied those requests. The immigration judge determined that respondent's detention was authorized by Section 303(b)(3)(B) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 303(b)(3)(B), 110 Stat. 3009-587. That section established transitional period custody rules, which authorized the Attorney General to release a lawfully admitted alien in respondent's circumstances during the pendency of removal proceedings, but only if the alien "satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceedings." *Ibid.*; J.A. 36, 41.[2] The immigration judge determined that respondent "would be a danger to the community if he is released" (J.A. 43), based, *inter alia*, on a psychological evaluation of respondent stating that he "exhibited little insight, denied any knowledge of the instant offense, and said he was not involved in any gang activity despite information to the contrary" (J.A. 42).[3] The immigration judge also

[2] As authorized by IIRIRA Section 303(b)(2), the transitional period custody rules were in effect for a two-year period commencing with IIRIRA's effective date. 110 Stat. 3009-586. See note 23, *infra*

[3] The report explained that "[p]olice reports indicate [that respondent] had been associated with the gang and its members for some time" and that "he was arrested at least twice [before that offense] with one of his codefendants on this case." A.R. 50.

pointed to respondent's lack of credibility in denying that he abused drugs (J.A. 42) and found "nothing in the respondent's file to indicate that he has rehabilitated" (J.A. 43).[4]

2. a. Respondent's order of removal became final on October 26, 1998. The final order of removal extinguished respondent's status as a lawful permanent resident and eliminated any legal right of respondent to remain in this country. See 8 U.S.C. 1101(a)(20) (1994); 8 U.S.C. 1101(a)(47)(B)(ii) (Supp. IV 1998); 8 C.F.R. 1.1(p). When the order became final, the INS began the process to remove respondent to Cambodia. By letter dated May 5, 1999, the United States requested travel documents for respondent from the Cambodian government. Pet. App. 58a.

During the 90-day period following the issuance of respondent's final removal order, respondent was detained by the INS pursuant to 8 U.S.C. 1231(a)(2) (Supp. IV 1998). That section mandates detention, during the 90-day period following entry of a final order, of an alien who, *inter alia*, has been found removable based on a conviction for an aggravated felony.

b. The INS was not able to remove respondent to Cambodia within the 90-day period following entry of his final removal order. Upon expiration of that period on January 24, 1999, respondent was no longer subject to mandatory detention. Instead, he was thereafter

[4] In addition, while respondent was in INS detention, he had to be transferred to another detention facility "[d]ue to behavior problems." A.R. 226. In a declaration in support of his request to be transferred to another facility where other INS detainees were housed, respondent acknowledged that he could "almost understand why the immigration judge may not want to release [him] on a bond." A.R. 231.

subject to 8 U.S.C. 1231(a)(6) (Supp. IV 1998), which authorizes the Attorney General to detain an alien who, *inter alia*, has been found removable based on a conviction of an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal."

The continued detention of an alien under Section 1231(a)(6) is subject to periodic review pursuant to the governing INS regulations, 8 C.F.R. 241.4, and implementing directives, see Pet. App. 64a-68a, 90a-91a. By memorandum dated February 3, 1999, entitled "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," the Executive Associate Commissioner of the INS "clarifie[d] the authority of [INS] District Directors to make release decisions and emphasize[d] the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act [8 U.S.C. 1231(a)(2) (Supp. IV 1998)]." Pet. App. 64a. The first periodic review mandated by INS procedures is during the 90-day removal period. *Ibid.* Thereafter, a detainee's custody status is automatically reviewed on a periodic basis "to determine whether there has been a change in circumstances that would support a release decision since the 90 day review." *Id.* at 66a.

On April 13, 1999, the INS notified respondent that, because the INS was encountering delays in making arrangements for respondent's removal, it would consider releasing him from detention. J.A. 57-58. The INS explained, though, that before respondent could be released, the INS District Director would have to be satisfied that, if released, respondent would not pose a danger to the community and would appear for all

future proceedings. J.A. 57. The INS listed various factors that the District Director would consider in reaching his decision and notified respondent that he could present evidence that he would not pose a danger to the community and would appear as ordered in the future. J.A. 57-58.

Pursuant to that notice, the INS conducted its first periodic review of respondent's custody in May 1999. That review included an interview of respondent and consideration of supporting documentary material submitted by his family and friends. Pet. App. 77a-86a. On June 2, 1999, the INS notified respondent that it had decided to continue to detain him, based on a consideration of the factors set forth in the governing regulations and all material submitted by respondent during the review process. *Ibid.* That notice detailed the statement made by respondent and his attorney, as well as the evidence submitted by respondent concerning his family ties, but also noted, under "Community Concerns," that respondent "was a member of the 'Local Asian Boyz' (LAB) in the Seattle area and was convicted of Manslaughter in the 1st Degree." *Id.* at 80a. It further noted that respondent had to be transferred to a different detention facility because of conduct while in INS custody. *Ibid.*

The notice informed respondent that his custody would be subject to review again on December 2, 1999. It also informed respondent that he could, at any time, request a redetermination of his custody status, if supported by evidence that he would appear at all future immigration proceedings and that he would not pose a threat to the community. Pet. App. 78a.

3. Meanwhile, on February 2, 1999, respondent had filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2241, in the United States District Court for the Western District of Washington. J.A. 1. The peti-

tion, as amended, contended that respondent's continued detention was unconstitutional. J.A. 59-65. Respondent's case was one of approximately 100 such cases then pending in the Western District of Washington.

a. On July 9, 1999, five judges of the district court issued a joint order in respondent's case and four other "lead" cases. Pet. App. 34a-51a. The judges addressed the cases jointly because they involved substantive and procedural due process challenges similar to those brought by a large number of aliens who were in INS detention in that district following final orders of removal and whose immediate removal was not then possible. *Id.* at 35a. The court did not, however, question that 8 U.S.C. 1231(a)(6) (Supp. IV 1998) authorizes the continued detention of such aliens as a statutory matter. Pet. App. 38a.

The five-judge panel's joint order established a framework for analyzing an individual habeas petitioner's claim that his detention violates due process. It first rejected the government's submission that the interest of respondent and the other habeas petitioners is the interest in being released into the United States pending their removal. In the panel's view, their interest is, more broadly, a "fundamental liberty interest in being free from incarceration," which requires "strict scrutiny" of any decision to detain aliens in respondent's position. Pet. App. 43a-44a. The panel rejected the government's argument that a more deferential standard should apply because of the plenary power of the Legislative and Executive Branches over immigration matters, holding that such deference does not extend to detention following a final order of removal. *Id.* at 45a.

Applying strict scrutiny, the five-judge panel acknowledged that detention of aliens such as respondent furthers the legitimate governmental interest in securing the safe removal of aliens and what it termed the "incidental" goals of preventing flight and protecting the public from dangerous felons. Pet. App. 46a. In the panel's view, then, the substantive due process question turns on whether the detention is excessive in relation to those goals. *Id.* at 47a. Resolution of that question, it explained, requires a court to "balance the likelihood that the government will be able to effectuate deportation, against the dangerousness of a petitioner and the likelihood that he will abscond if released." *Ibid.* The panel noted that the government's interest in detention decreases as the probability of removal of the alien decreases, concluding that it would be excessive "to detain an alien indefinitely if deportation will never occur." *Ibid.* Application of that substantive due process test was left to each judge in the individual cases. *Ibid.*

The five-judge panel then turned to the procedural due process question. It reasoned that, if there is no substantive due process violation with respect to a particular alien under the framework it announced, it must be determined whether the procedures for detention of the alien are adequate. Pet. App. 48a. The panel held that the procedures under which INS District Directors made release decisions—based on a review of the administrative file, the alien's written submission or an interview with the alien, and consideration of the criteria identified in 8 C.F.R. 241.4—did not satisfy due process because, in its view, the INS "[did] not meaningfully and impartially review the petitioners' custody status." Pet. App. 50a. The panel therefore held that each habeas petitioner is entitled to a hearing before an immigration judge at which he or she can present evidence in support of release pending removal, and that the habeas petitioner must be able to appeal any

denial of a release request to the Board of Immigration Appeals. *Id.* at 51a.

b. On July 13, 1999, the district court issued an order in respondent's individual case, incorporating the joint order and applying the analysis of that order to his case. Pet. App. 52a-54a. The court determined that certain facts relevant to determining the weight of the government's interest under the due process analysis were not adequately developed in the record, and it ordered an evidentiary hearing. *Id.* at 54a.

c. On September 29, 1999, the district court granted respondent habeas corpus relief. Pet. App. 55a-61a. Although the government contended that the court should not adhere to the joint order in light of intervening developments, including the INS's institution of additional review procedures, the court decided to follow the joint order. *Id.* at 56a n.1.

Applying the framework of the joint order, the court first reviewed the government's representations concerning negotiations between the United States and Cambodia about entering into a formal agreement for the repatriation of Cambodian nationals. Pet. App. 59a. Those negotiations included a meeting in September 1999 between officers of the Department of State and the Cambodian Consulate in Washington, D.C., at which the United States' preliminary proposal for a repatriation agreement was discussed. Despite those developments, the court concluded that "there is not a realistic chance that the government will accomplish [respondent's] deportation to Cambodia." *Id.* at 60a. The court then held that respondent's detention, which it characterized as "indefinite," "violates his right to substantive due process." *Ibid.* The court also noted that, "[e]ven if there were a realistic chance of deporting [respondent], the government has not shown a strong interest in continuing his detention based upon

his threat to the public or his proclivity to abscond." *Ibid.* The court therefore directed that respondent be released subject to appropriate conditions. *Id.* at 61a.[5]

d. The district court stayed its order granting habeas corpus relief in order to permit the government time to seek a stay from the court of appeals. Pet. App. 7a n.9. The court of appeals denied the stay request, and respondent was then released from INS custody on October 25, 1999. *Ibid.* On October 29, 1999, the government filed an application in this Court for a stay of the district court's order pending appeal to the Ninth Circuit. The Court denied that application. 120 S. Ct. 466 (1999).

4. During the pendency of respondent's case, the INS had implemented additional interim review procedures for cases involving aliens such as respondent who are detained in INS custody following issuance of final orders of removal because their immediate removal is not practicable. See Pet. App. 69a-76a. By memorandum dated August 6, 1999, the INS Executive Associate Commissioner directed that, under the new interim procedures, a decision to continue an alien in INS custody would be subject to a review by INS Headquarters. The headquarters review is similar to that afforded under the Cuban Review Plan, 8 C.F.R. 212.12, which has been in place for a number of years to review the status of Mariel Cubans—Cubans who came to the United States during the Mariel boatlift between April 15 and October 1980, see 8 C.F.R. 212.12(a)—who have been ordered excluded from the United States but who cannot be returned to Cuba at this time. Pet. App. 71a.

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[5] In light of its resolution of the case on substantive due process grounds, the court found it unnecessary to address any questions regarding procedural due process. Pet. App. 61a n.5.

Under the interim procedures, the June 1999 decision to continue respondent in custody became subject to INS Headquarters review. That review had not taken place by the time of the district court's September 29, 1999, order granting habeas corpus relief, but the adoption of the additional review procedures was brought to the court's attention. See Pet. App. 57a. The Headquarters review in respondent's case took place on September 30, 1999, and the determination was to continue respondent in INS custody. See *id.* at 87a-89a.[6]

5. The court of appeals affirmed the district court's judgment granting respondent habeas corpus relief, Pet. App. 1a-33a, but without reaching the constitutional grounds on which the district court had relied. The court of appeals instead relied on statutory grounds, holding that the INS lacks authority under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain respondent beyond the 90-day removal period. Pet. App. 3a-4a.[7]

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[6] On June 30, 2000, the Commissioner published proposed regulations to put in place a permanent custody-review program that would maintain or enhance the centralized review and other procedural protections set forth in the interim procedures. 65 Fed. Reg. 40,540-40,548.

[7] On March 30, 2000, respondent was arrested for assaulting a female companion. Respondent was released by the state court on bond pending disposition of the resulting criminal charges. On June 26, 2000, the state court dismissed the charges. The State has appealed from that judgment. See *City of Kent* v. *Kim Ho Ma*, No. K24949FV (Mun. Ct., City of Kent, King County, Wash.), notice of appeal (filed July 25, 2000); *City of Kent* v. *Kim Ho Ma*, No. 00-1-07772-2SEA (King County Super. Ct., Wash.), order setting case schedule and deadline of Dec. 27, 2000, for filing of appellant's brief (Sept. 27, 2000).

After respondent's arrest, he was informed by the INS that it intended to revoke his release from immigration custody based on his violation of the terms of release. Respondent filed a motion in district court on April 7, 2000, seeking an order to prevent the INS from ordering him back into custody for violating his release conditions. On April 10, 2000, the court of appeals issued its decision affirming the district court judgment. In light of that decision, the government moved the district court to stay the hearing set for April 19 on the matter of INS's revocation of respondent's release, and the district court granted that motion.

The court of appeals acknowledged that Section 1231(a)(6) unambiguously authorizes the Attorney General to continue criminal aliens in custody "beyond the removal period." Pet. App. 10a. The court concluded, however, that, because Section 1231(a)(6) does not specify a particular length of time during which continued detention is authorized, it should be construed to permit detention "only for a reasonable time beyond the statutory removal period." *Id.* at 11a. "In cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future," the court "conclude[d] that the statute does not permit the Attorney General to hold the alien beyond the statutory removal period." *Ibid.* The court explained that it adopted that construction of Section 1231(a)(6) because it allowed the court to avoid deciding the constitutionality of respondent's detention, *id.* at 14a-22a[8]; because the court was unwilling

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[8] The court of appeals rejected the government's argument that the constitutional question was answered by the Ninth Circuit's en banc decision in *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, cert. denied, 516 U.S. 976 (1995), and this Court's decision in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). The court distinguished those cases on the ground that they involved excludable aliens, *i.e.* aliens who had not entered the country, rather than aliens who already entered the country and who, the court reasoned, have greater constitutional rights even after a final order of removal is entered against them. Pet. App. 14a-22a. The court noted that the Fifth Circuit, in resolving the constitutional question in *Zadvydas* v. *Underdown*, 185 F.3d 279 (1999),

to conclude that Congress intended to authorize what it termed "indefinite detention" in the absence of a clear statement to that effect, *id.* at 25a; because the court believed that reading a "reasonable time" limitation into Section 1231(a)(6) would be consistent with the Ninth Circuit's interpretation in the 1900s and 1930s of a differently worded detention provision in the Immigration Act of 1917, ch. 29, 39 Stat. 874, *id.* at 26a-29a; and because that interpretation is, in the court's view, more "consonant with international law," *id.* at 11a, 29a-31a. *Ibid.*

The court of appeals then concluded that there is no reasonable likelihood that the INS will be able to remove respondent to Cambodia "[i]n the absence of a repatriation agreement, extant or pending." Pet. App. 32a. Therefore, under the court's ruling, the INS was no longer authorized to detain respondent. *Ibid.*[9]

SUMMARY OF ARGUMENT

The Attorney General is authorized by 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the statutory removal period if the alien, like respondent, cannot be removed immediately from the country and the Attorney General has determined that the alien would pose a risk of flight or danger to the community

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cert. granted, 121 S. Ct. 297 (2000), had concluded that an alien under a final order of removal stands on essentially the same footing as an excludable alien. Pet. App. 20a n.23. The court of appeals declined to adopt that approach, however, and decided, instead, to avoid the constitutional question by its statutory construction. *Ibid.*

[9] On June 2, 2000, the court of appeals denied rehearing and rehearing en banc. Although an active judge requested a vote on whether to rehear the matter en banc, the matter failed to receive a majority of the votes of active judges in favor of en banc consideration. Pet. App. 62a-63a.

if released. The court of appeals' holding that the Attorney General's authority to detain aliens under Section 1231(a)(6) is limited to an unspecified "reasonable time" beyond the removal period is contrary to the text of Section 1231(a)(6), the structure of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the statutory history of the INA's detention provisions, and the Attorney General's authoritative interpretation of the Act, which is entitled to deference. In particular, the court of appeals' ruling that, in the case of an alien who cannot be removed in the reasonably foreseeable future, the "reasonable time" limitation mandates the release of the alien immediately upon expiration of the 90-day removal period—despite a determination by the Attorney General that the alien poses a risk to the community if released—cannot be reconciled with the manifest intent of Congress that dangerous criminal aliens not be released back into the community and that the Attorney General be vested with authority to determine which criminal aliens may safely be released after the 90-day removal period has expired.

A. The plain language of Section 1231(a)(6) provides that certain aliens, including aggravated felons and aliens who are determined by the Attorney General to pose a risk to the community if released, "may be detained beyond the removal period" by the Attorney General. The INA does not place a limit on the length of time beyond the removal period that such an alien may be detained. Section 1231(a)(6) instead leaves to the discretion of the Attorney General the decision whether to continue to detain an alien in such circumstances and, if so, for how long. The text of the INA refutes the court of appeals' assumption that Congress intended to place limits on post-removal-period detention of aliens who cannot be removed immediately due

to the refusal of the designated countries to accept their return. In the provision of the INA immediately following Section 1231(a)(6), Congress expressly provided for such aliens to be exempted from the mandatory bar to the granting of work authorization to aliens who have been ordered removed. See 8 U.S.C. 1231(a)(7) (Supp. IV 1998). If Congress had intended to create a comparable exception for such aliens from the Attorney General's detention authority under Section 1231(a)(6), Congress would have expressly so provided in similar language.

B. The other provisions of the INA governing detention of criminal aliens during the other phases of the removal process, *i.e.*, during the pendency of removal proceedings (8 U.S.C. 1226(c) (Supp. IV 1998)) and during the statutory 90-day removal period (8 U.S.C. 1231(a)(2) (Supp. IV 1998), were enacted contemporaneously with Section 1231(a)(6) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and establish that Congress intended for mandatory detention of criminal aliens to be the general rule. To interpret the exception in Section 1231(a)(6) to that general rule of *mandatory detention* as a provision for *mandatory release* of a criminal alien such as respondent at any time, let alone immediately upon expiration of the 90-day removal period, would undermine one of the central objectives of IIRIRA.

C. Interpreting Section 1231(a)(6) to vest the Attorney General with the authority to detain criminal aliens in respondent's position beyond the 90-day removal period is consistent with the history of the predecessor statutes governing detention of criminal aliens. Moreover, the legislative evolution of the provision that became Section 1231(a)(6) confirms that Congress did not intend to require the release by the Attorney

General of a criminal alien under a final removal order who is determined to pose a risk to the community.

D. If there is any remaining doubt about the scope of the Attorney General's authority under Section 1231(a)(6), it is resolved by the principle that deference is owed by the courts to the Attorney General's interpretation of the INA. The circumstances confronting the Attorney General when the removal of a criminal alien cannot be effectuated because of the recalcitrance of another nation present the very type of serious questions affecting international relations and foreign policy that call for deference to the political Branches. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953). The Attorney General's interpretation undoubtedly constitutes a reasonable construction of Section 1231(a)(6), and therefore should be sustained by this Court. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

E. The court of appeals erred in construing Section 1231(a)(6) to bar detention of respondent in order to avoid what it believed to be a serious constitutional question. The constitutional-doubt canon cannot be applied to override the clear intent of Congress, as reflected in the text of Section 1231(a)(6). Nor would application of that canon be consistent with Congress's clear intent that deportable criminal aliens such as respondent be treated the same as inadmissible aliens under Section 1231(a)(6). As the court of appeals acknowledged (Pet. App. 17a-18a), there can be no suggestion that Congress intended to mandate the release of dangerous inadmissible aliens after expiration of the removal period because it is well established, under *Mezei*, that an inadmissible alien may be subject to long-term detention when he cannot be removed in the reasonably foreseeable future. And Section 1231 is not susceptible to a constitutional doubt interpretation

analogous to that employed in *United States* v. *Witkovich*, 353 U.S. 194 (1957) (on which the court of appeals relied), because, unlike the statute at issue there, Section 1231(a)(6) specifically provides that, when making a determination whether to detain an alien beyond the removal period, the Attorney General may consider not only the likelihood that the alien will comply with the removal order, but also the risk the alien poses to the community if released. Finally, the court of appeals' substantive due process concerns about respondent's continued detention were unfounded because respondent's detention is not indefinite in light of the Attorney General's administrative review procedures and the ongoing international negotiations with the designated country of removal, see *Zadvydas* v. *Underdown*, 185 F.3d 279, 291, 294 (5th Cir. 1999), cert. granted, 121 S. Ct. 297 (2000), and because, as an alien under a final order of removal, respondent is no longer a lawful permanent resident and is properly treated in the same manner as an excludable alien with respect to the constitutionality of his detention pending removal.

ARGUMENT

SECTION 1231(a)(6) OF TITLE 8 AUTHORIZES THE ATTORNEY GENERAL TO DETAIN AN ALIEN BEYOND THE STATUTORY REMOVAL PERIOD IF THE ALIEN CANNOT BE REMOVED IMMEDIATELY FROM THE COUNTRY BUT THE ATTORNEY GENERAL HAS DETERMINED THAT THE ALIEN WOULD POSE A RISK OF FLIGHT OR DANGER TO THE COMMUNITY IF RELEASED

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that certain aliens who are inadmissible to the United States (8 U.S.C. 1182(a) (Supp. IV 1998)), and certain already admitted aliens

who are deportable from the United States (8 U.S.C. 1227 (Supp. IV 1998)), are to be removed from the country.[10] With exceptions inapplicable here, the inadmissibility or deportability of an alien and the alien's eligibility for any relief from removal are determined in removal proceedings conducted by immigration judges and the Board of Immigration Appeals in the Department of Justice's Executive Office of Immigration Review, pursuant to regulations of the Attorney General. 8 U.S.C. 1228, 1229a (Supp. IV 1998); 8 C.F.R. 3.0-3.65.[11] Whether an alien is detained in the custody of the INS during the pendency of those removal proceedings is governed by 8 U.S.C. 1226 (Supp. IV 1998).

Upon completion of removal proceedings and the entry of a final removal order, the Attorney General is directed by 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998) to remove the alien from the United States within a period of 90 days, which is termed the "removal

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[10] Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 301, 110 Stat. 3009-575, the INA referred to "inadmissible" aliens as "excludable" aliens (*e.g.*, 8 U.S.C. 1182 (1994)), and to "removal" proceedings as "exclusion" or "deportation" proceedings (*e.g.*, 8 U.S.C. 1227, 1252 (1994)).

[11] The removability of an alien who is not a lawful permanent resident and who has been convicted of an aggravated felony may be determined in administrative proceedings conducted by an officer of the INS rather than an immigration judge and the BIA. See 8 U.S.C. 1228(b) (Supp. IV 1998); 8 C.F.R. 238.1(b). Similarly, certain arriving aliens may be ordered removed by an INS officer in expedited removal proceedings without further hearing or review. See 8 U.S.C. 1225(b) (Supp. IV 1998); 8 C.F.R. 235.3(b). Finally, under 8 U.S.C. 1228(c) (Supp. IV 1998), a federal district court may enter an order of removal in a criminal prosecution at the time of sentencing, if such an order has been requested by the United States Attorney with the concurrence of the Commissioner of the INS.

period."[12] Whether an alien is detained in the custody of the INS during that removal period is governed by a separate provision of the INA, 8 U.S.C. 1231(a)(2) (Supp. IV 1998).

In certain cases, the Attorney General may be unable to effectuate an alien's removal during the 90-day removal period. Whether an alien is detained in the custody of the INS beyond the removal period is governed by yet another provision of the INA, 8 U.S.C. 1231(a)(6) (Supp. IV 1998). This case concerns the scope of the Attorney General's detention authority under Section 1231(a)(6). The court of appeals held that if there is not a reasonable likelihood that an alien will be removed to another country in the reasonably foreseeable future, Section 1231(a)(6) requires the Attorney General to release the alien immediately upon expiration of the statutory 90-day removal period—even if the Attorney General has determined that the alien would pose a danger to the community or risk of flight if released, and even though the alien's continued detention is subject to periodic review under procedures specifically tailored to evaluate the alien's situation on an individualized basis. That holding is contrary to the text of Section 1231(a)(6), the structure of the INA, the statutory history of the INA's detention provisions, and the Attorney General's authoritative interpretation of the

[12] The 90-day removal period begins on the latest of: "(i) [t]he date the order of removal becomes administratively final"; "(ii) [i]f the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order"; or "(iii) [i]f the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement." 8 U.S.C. 1231(a)(1)(B) (Supp. IV 1998). The removal period is extended beyond 90 days if the alien fails or refuses to make timely application in good faith for the documents necessary to his departure. 8 U.S.C. 1231(a)(1)(C) (Supp. IV 1998).

Act, which is entitled to deference under *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

A. The Plain Language Of Section 1231(a)(6) Vests The Attorney General With The Authority To Detain Aliens Such As Respondent Beyond The Removal Period

1. Section 1231(a)(6) of Title 8 of the United States Code provides that "[a]n alien ordered removed" who is "inadmissible under section 1182," "removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4)," or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal," "*may be detained beyond the removal period.*" 8 U.S.C. 1231(a)(6) (Supp. IV 1998) (emphasis added).[13] The plain language of Section 1231(a)(6) thus vests the Attorney General with the authority to continue an alien in detention beyond the removal period if the alien falls within one of following categories: the alien is inadmissible on any basis (Section 1182); deportable because he violated his nonimmigrant status or a specially imposed condition of entry (Section 1227(a)(1)(C)); deportable because he was convicted of a specified criminal offense (Section 1227(a)(2)); deportable because he engaged in activity that endangered the public safety or national security

[13] Respondent is removable under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) because he was convicted of an aggravated felony. That conviction in itself therefore furnishes a basis for the Attorney General to exercise her discretionary authority under Section 1231(a)(6) to detain respondent beyond the removal period. The Attorney General's determination to continue respondent in detention under Section 1231(a)(6) also rested, however, on her determination that he would pose a risk to the community if released. See Pet. App. 87a (INS headquarters review committee unable to conclude that respondent would remain nonviolent and not violate the conditions of supervision if released).

or related conduct (Section 1227(a)(4)); or is determined by the Attorney General to pose a risk to the community or to be unlikely to comply with the removal order.

The INA contains no language otherwise limiting the Attorney General's authority to detain an alien after expiration of the removal period. In particular, the Act does not place a limit on the length of time beyond the removal period that an alien who falls within one of the Section 1231(a)(6) categories may be detained. To the contrary, by using the term "may," Congress committed to the discretion of the Attorney Generai the ultimate decision whether to continue to detain such an alien and, if so, in what circumstances and for how long. *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion.").

Moreover, the text of Section 1231(a)(6) refutes the court of appeals' conclusion that whether or not the alien will actually be removed in the immediate future is dispositive on the question of continued detention in a case such as this. Section 1231(a)(6) makes clear that, in deciding whether to continue an alien in detention beyond the 90-day removal period, the Attorney General must take into account not only the effect that an alien's release would have on his availability for removal, but also whether the alien would pose "a risk to the community." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). If the Attorney General determines that an alien would pose such a risk if released, the Attorney General is unequivocally granted the authority to detain the alien beyond the removal period on that ground alone, without regard to the likelihood that he will comply with an order of removal and thus actually be removed. Congress's decision to vest that authority in the Attorney General is consistent with the recognition by this Court that detention of dangerous aliens furthers not only the

government's interest in ensuring the alien's availability for removal, but also its distinct interest in protecting the community from aliens who are likely to cause harm if released. See *Carlson* v. *Landon*, 342 U.S. 524, 538 (1952) ("Detention is necessarily a part of this deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.").

2. There is nothing in the text of Section 1231(a)(6) or any other provision of the INA to support the court of appeals' interpretation of Section 1231(a)(6) to require the release of aliens after expiration of an unspecified "reasonable time" beyond the 90-day removal period. Pet. App. 3a, 10a-11a. And there certainly is no textual support for mandating, as the court of appeals did (*id.* at 3a-4a, 11a), the release of an alien immediately upon expiration of the 90-day removal period if there is not a reasonable likelihood that he will be removed in the reasonably foreseeable future—especially where the Attorney General has determined that the alien poses a risk to the community or would be unlikely to comply with the order of removal.

By "reading an implicit 'reasonable time' limitation into the statute" (Pet. App. 11a), the court of appeals ignored this Court's admonition to resist an interpretation that "read[s] words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997). In rejecting the same "reasonable time" argument, the Tenth Circuit emphasized that Section 1231(a)(6) "*expressly* allows for continued detention beyond the removal period with no time limit placed on the duration of such detention." *Duy Dac Ho* v. *Greene*, 204 F.3d 1045, 1057 (2000). That court correctly declined to "substitute its judgment for that of Congress by reading into the statute a time limit that

is not included in the plain language of the statute." *Ibid.* It concluded:

> The unambiguous language of 8 U.S.C. § 1231(a)(6) and the absence of an express time limit on the Attorney General's authority to continue to detain leads this court to conclude that Congress intended to and expressly did authorize the Attorney General to indefinitely detain certain removable aliens * * * who cannot be removed within the ninety-day removal period.

Ibid.[14]

The Ninth Circuit nevertheless carved out an exception to the Attorney General's post-removal-period detention authority under Section 1231(a)(6) for aliens

[14] In construing Section 1231(a)(6) to require the INS to release an alien in respondent's position immediately upon expiration of the 90-day removal period, the Ninth Circuit relied (Pet. App. 26a-29a) on several decisions by that court, rendered in 1932 or earlier, that arose under the Immigration Act of 1917 and that indicated that an alien should be discharged from custody if he was not removed within a reasonable period of time. As the court of appeals itself pointed out, however, those decisions "did not interpret a statute exactly like the one consider[ed]" here. *Id.* at 28a. Indeed, the earlier statute involved in those cases "provided simply that deportable aliens should be 'taken into custody and deported.'" *Id.* at 26a. That statute did not contain the language that is now found in Section 1231(a)(6) explicitly authorizing detention "beyond the removal period." *Ibid.* Moreover, as the court of appeals also acknowledged (*id.* at 28a), those earlier cases "do not make their reasoning entirely explicit." And all but one of the cases was decided before this Court's decision in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), discussed at pp. 46, 49, *infra*. The one case decided after *Mezei* involved a question about the ongoing validity of a deportation order, not a detention issue; it discussed the earlier Ninth Circuit decisions only in dictum, and did not cite *Mezei*. See *Spector* v. *Landon*, 209 F.2d 481 (9th Cir. 1954).

who cannot be removed in the reasonably foreseeable future, regardless of the risk of flight or danger to the community posed by the alien. The court treated the prospect that the alien might not be removed in the foreseeable future as a possibility not contemplated by Congress, and one that the court assumed would have led Congress to place limits on post-removal-period detention. The court therefore chose to read into Section 1231(a)(6) a prohibition on the continued detention of aliens in that situation. See Pet. App. 11a (court's interpretation permitted it to avoid assuming that Congress intended to allow continued detention of aliens who cannot be removed). Even if we assume, arguendo, that the court could insert a statutory prohibition that appears nowhere in the Act itself, the predicate for the court's approach is erroneous. It is clear from the text of the Act that Congress specifically contemplated that other countries might refuse to accept the return of an alien who has been ordered removed. And it is also clear from the text of the Act that when Congress wanted to treat such aliens differently, it did so explicitly.

Section 1231(a)(7)—the subsection immediately following Section 1231(a)(6)—provides as a general rule that no alien ordered removed is eligible to receive authorization to work in the United States. However, Congress enacted an exception to that ineligibility for situations in which the Attorney General specifically finds that either "the alien cannot be removed due to the refusal of all countries designated by the alien or under [Section 1231] to receive the alien," or "the removal of the alien is otherwise impracticable or contrary to the public interest." 8 U.S.C. 1231(a)(7) (Supp. IV 1998). Certainly, if Congress had intended that the Attorney General not have the discretion under Section 1231(a)(6) to detain beyond the initial 90-day removal

period those aliens who cannot be removed due to the refusal of other countries to receive them, Congress would have expressly so provided by carving out an exception for such aliens in Section 1231(a)(6) in the same manner that it expressly carved out an exception for such aliens from the mandatory bar to the granting of work authorizations in Section 1231(a)(7).[15]

B. Other Statutory Provisions Governing Detention Of Criminal Aliens Confirm That Congress Did Not Mandate The Release Of Criminal Aliens Who Pose A Risk Of Flight Or Danger To The Community

When Congress enacted Section 1231(a)(6) in 1996 as part of IIRIRA (§ 305(a)(3), 110 Stat. 3009-598) to govern the detention of criminal aliens beyond the removal period, Congress enacted two other provisions to govern the detention of criminal aliens during earlier phases of the removal process. Those other detention provisions establish that Congress's intent when enacting IIRIRA was for detention of criminal aliens to be the general rule. The exception in Section 1231(a)(6) allowing the Attorney General to release criminal aliens in certain circumstances was adopted only for criminal aliens who are not removed within the statutory 90-day removal period. To interpret that exception to a general rule of *mandatory detention* as a provision for *mandatory release* of a criminal alien such as respon-

[15] Other provisions of IIRIRA likewise specifically refer to the situation in which another country will not accept the return of its nationals. See IIRIRA § 303(b)(3)(B)(ii), 110 Stat. 3009-587 (discussed at note 23, *infra*), and IIRIRA § 307(a), 110 Stat. 3009-614 (discussed at note 25, *infra*). Cf. 8 U.S.C. 1231(a)(1)(C) (Supp. IV 1998) (expressly addressing situation in which alien is not removed because alien fails or refuses to make timely application for documents necessary to removal, and providing for extension of removal period (and thus mandatory detention of criminal aliens) in that situation).

dent, despite a determination by the Attorney General that the alien poses a risk to the community, would undermine one of the central objectives of IIRIRA.

Under 8 U.S.C. 1226(c) (Supp. IV 1998) (enacted in IIRIRA § 303(a), 110 Stat. 3009-585), certain criminal aliens (including aliens like respondent who have been convicted of an aggravated felony) are subject to mandatory detention during the pendency of the proceedings to determine whether they are to be removed.[16] Section 1226(c)(1) provides that the Attorney General shall take covered criminal aliens into custody upon their release from imprisonment under their criminal sentences. See App., *infra*, 2a. The authority of the Attorney General to release a criminal alien during the pendency of removal proceedings is severely restricted. Only aliens whose release is necessary to protect a person involved in a major criminal investigation are eligible for release. Even then, an alien may not be released unless he "satisfies the Attorney General that [he] will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2) (Supp. IV 1998). Congress also specified that, when making a release determination under that provision, the Attorney

[16] The mandatory detention provision in Section 1226(c) applies to aliens who are inadmissible by reason of having committed an offense covered in Section 1182(a)(2) (criminal grounds); inadmissible under Section 1182(a)(3)(B) (terrorist activities); deportable by reason of having committed an offense covered by Section 1227(a)(2)(A)(i) (crimes of moral turpitude, but only if a sentence of at least one year imprisonment was imposed), Section 1227(a)(2)(A)(ii) (multiple criminal convictions), Section 1227(a)(2)(A)(iii) (aggravated felony), Section 1227(a)(2)(B) (controlled substance offenses), Section 1227(a)(2)(C) (certain firearm offenses), or Section 1227(a)(2)(D) (miscellaneous other crimes); or deportable under Section 1227(a)(4)(B) (terrorist activities).

General must consider the severity of the alien's offense. *Ibid.* After removal proceedings are concluded and a removal order becomes final, all criminal aliens are again subject to mandatory detention during the statutory 90-day removal period. 8 U.S.C. 1231(a)(2) (Supp. IV 1998) (enacted in IIRIRA § 305(a)(3), 110 Stat. 3009-598); see App., *infra*, 4a.[17] Section 1231(a)(2) generally provides that the Attorney General shall detain an alien during the removal period, and specifies that, "[u]nder no circumstance during the removal period shall the Attorney General release" a criminal alien. 8 U.S.C. 1231(a)(2) (Supp. IV 1998).

When read as part of this broader statutory context, it is evident that Section 1231(a)(6) constitutes only a relaxation by Congress of the rule of *mandatory* detention of all criminal aliens for those cases in which the alien's removal is delayed beyond the statutory 90-day removal period. At that point, as the text of Section 1231(a)(6) makes clear, the Attorney General continues to have authority to detain the alien; that authority simply becomes discretionary rather than mandatory. Furthermore, in contrast to Sections 1226(c) and 1231(a)(2), under which the termination of the applicable detention authority is demarcated by a particular event (under Section 1226(c), by the completion of removal proceedings, and under Section 1231(a)(2), by the expiration of the statutory removal period), Section 1231(a)(6) does not set a time limit on the Attorney General's authority to continue to detain the alien. Congress's grant to the Attorney General of authority

[17] The mandatory-detention provision of Section 1231(a)(2) applies to aliens who have been found inadmissible under Section 1182(a)(2) (all criminal and related grounds) or 1182(a)(3)(B) (terrorist activities), or deportable under Section 1227(a)(2) (all criminal offenses) or 1227(a)(4)(B) (terrorist activities).

to release criminal aliens at all represented a concession to the fact that Section 1231(a)(6) could result in prolonged detention, and reflected its willingness to place the responsibility on the Attorney General to exercise individualized judgment about whether to release a particular criminal alien who cannot be removed within the 90-day removal period. It would run contrary to the central thrust of all of the IIRIRA detention provisions to suggest that Congress intended not only to allow but to *mandate* release of dangerous criminal aliens at any time, let alone immediately upon expiration of the 90-day removal period, as the court of appeals ordered.[18]

C. The Statutory History Of Section 1231(a)(6) Further Demonstrates That The Attorney General Has Statutory Authority To Detain Aliens In Respondent's Position

1. *The Predecessor Statutes To IIRIRA Support An Interpretation Of Section 1231(a)(6) That Authorizes The Attorney General To Detain Criminal Aliens Beyond The Statutory Removal Period*

An interpretation of Section 1231(a)(6) that allows continued detention of criminal aliens is "also consonant with the history of evolving congressional regulation in this area." *Dunn* v. *Commodity Futures Trading*

[18] At the time respondent filed his habeas corpus petition on February 2, 1999, claiming that his continued detention was unconstitutional, he had been detained under the authority of Section 1231(a)(6) for less than ten days. During the statutory 90-day removal period, which expired on January 24, 1999, respondent's detention was governed by Section 1231(a)(2); and prior to the time a final order of removal was entered, his detention was governed by IIRIRA's transitional period custody rules. See p. 4, *supra*. By the time of the district court's order granting him habeas corpus relief, respondent had been detained under the authority of Section 1231(a)(6) for eight months.

Comm'n, 519 U.S. 465, 475 (1997). Congress's decision when it enacted IIRIRA in 1996 to allow the Attorney General to prevent the release back into the community of dangerous criminal aliens under final orders of removal was a culmination of various congressional actions over the preceding years to protect the community from such aliens.

As we explained in our certiorari petition (at 18-22), since at least 1990, Congress has unequivocally exempted the detention of aggravated felons following entry of a final order of deportation from any statutory time limit that applied generally to the detention of other aliens. Indeed, Congress has consistently allowed, and at times mandated, that the Attorney General continue to detain aggravated felons. By contrast, nothing in the last decade of amendments to the INA remotely suggests that Congress intended that, rather than having six months to effectuate deportation with varying degrees of authority to detain criminal aliens thereafter, as under prior law, the Attorney General would now be subject to a judicially imposed limitation of only a "reasonable time" beyond 90 days, which in this case was deemed to be no time at all.

Before the enactment of IIRIRA, the provisions of the INA governing the Attorney General's detention of an alien who was subject to a final order of deportation were found in Section 1252 of Title 8, which had been enacted in 1952 as Section 242 of the INA. 66 Stat. 208. Initially, Section 1252(c) and (d) provided that the Attorney General had a six-month period following entry of a final order of deportation during which to effect an alien's deportation. During that period, the alien could be detained or released at the discretion of the Attorney General. 8 U.S.C. 1252(c) (1982). After expiration of that period, "[i]f deportation ha[d] not been practicable, advisable, or possible, or departure of

the alien from the United States under the order of deportation ha[d] not been effected," the alien became "subject to such further supervision and detention pending eventual deportation" as was authorized in Section 1252. 8 U.S.C. 1252(c) (1982). If an alien's final order of deportation was outstanding for more than six months, the alien was, "pending eventual deportation, * * * subject to supervision under regulations prescribed by the Attorney General." 8 U.S.C. 1252(d) (1982).

In 1988, Congress enacted a provision directing the Attorney General to take into custody any alien convicted of an aggravated felony upon completion of his criminal sentence, and not to release the aggravated felon from custody, notwithstanding 8 U.S.C. 1252(a)(1) (1988), which otherwise permitted the discretionary release of aliens while deportation proceedings were pending. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4470; 8 U.S.C. 1252(a)(2) (1988). In 1990, Congress amended that mandatory-detention provision to specify, *inter alia*, that it also applied notwithstanding subsections (c) and (d) of Section 1252—the provisions that otherwise generally governed an alien's detention after he became subject to a final order of deportation. The 1990 amendment also added a statutory exception to the mandatory-detention provision that required the release on bond or other conditions of an aggravated felon who had been lawfully admitted for permanent residence, but only if the Attorney General determined that the alien was not a threat to the community and was likely to appear for immigration hearings. See Immigration Act of 1990, Pub. L. No. 101-649, § 504(a), 104 Stat. 5049; 8 U.S.C. 1252(a)(2)(A) and (B) (1988 & Supp. II 1990).

In 1991, Congress amended the statutory exception to the provision for mandatory detention of aggravated

felons to specify that the Attorney General could not release any lawfully admitted alien who was an aggravated felon, "either before or after a determination of deportability," unless the alien demonstrated "to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings." Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(4), 105 Stat. 1751; 8 U.S.C. 1252(a)(2)(B) (Supp. III 1991); 8 U.S.C. 1252(a)(2)(B)(1994); see *Duy Dac Ho* v. *Greene*, 204 F.3d at 1056 n.8.[19]

On April 24, 1996, Congress again amended 8 U.S.C. 1252(a)(2) (1994) through enactment of Section 440(c) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277. That amendment expanded the group of criminal aliens subject to mandatory detention beyond aggravated felons, to include aliens convicted of other specified crimes. *Ibid.* At the same time, the amendment eliminated the provision allowing the Attorney General to release criminal aliens, even those lawfully admitted aliens who she determined would not pose a threat of danger to the community or flight if released. *Ibid.* Thus, as the court of appeals recognized (see Pet. App. 25a n.25), under former Section 1252(a)(2), as amended by AEDPA, 110 Stat. 1277, respondent would have been subject to *mandatory* detention following entry of a final order of deportation for as long as Cambodia refused to accept his return.

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[19] The 1990 amendment only permitted the release of an aggravated felon who had been lawfully admitted for permanent residence. The 1991 amendment applied to any alien who had been lawfully admitted.

It is against that backdrop that Congress, barely five months after it had enacted AEDPA, enacted the provisions of IIRIRA governing the detention of criminal aliens. While those provisions continue to mandate the detention of a criminal alien while removal proceedings are pending and during the 90-day removal period following entry of a final removal order, Section 1231(a)(6) now grants the Attorney General discretion to release a criminal alien after that date. As we explain below, there is no evidence whatsoever to suggest that, in enacting Section 1231(a)(6), Congress intended—in stark departure from the mandatory detention provision in AEDPA and indeed the entire thrust of its approach to the detention of criminal aliens over the course of the preceding decade—not only to permit but to *require* the Attorney General to release an aggravated felon who she determines would pose a danger to the community or a flight risk if released. To the contrary, the legislative history confirms that Section 1231(a)(6) is correctly interpreted, consistent with the congressional actions that preceded it, to ensure that the Attorney General retains the authority to detain such aliens, even when the country to which the alien has been ordered removed has declined to accept his return.

2. *The Legislative History Of Section 1231(a)(6) Confirms The Attorney General's Statutory Authority To Detain Aliens In Respondent's Position*

The legislative evolution of the provision that became Section 1231(a)(6) confirms that Congress did not intend to require the release by the Attorney General of a criminal alien under a final removal order who is determined to pose a risk of flight or danger to the community.

On June 22, 1995, a bill was introduced in the House of Representatives to reform immigration policy in several specific areas, including "removal of illegal and criminal aliens." See H.R. Rep. No. 879, 104th Cong., 2d Sess. 105 (1997) (Report on the Activities of the Committee on the Judiciary during the One Hundred Fourth Congress).[20] The bill,—H.R. 1915—provided, *inter alia*, for "more stringent standards for the release of aliens (particularly aliens convicted of aggravated felonies) during and after removal proceedings." H.R. 1915, 104th Cong., 1st Sess. § 300(3), at 36 (as introduced June 22, 1995). It mandated the detention of aliens during the post-final-order removal period, but authorized release of aliens on bond and supervision if the Attorney General found that there was insufficient detention space. *Id.* § 305(3), at 82. It further provided that, upon expiration of the removal period, *deportable* aliens would be released on supervision (*id.* § 305(3), at 82-83), but *inadmissible* aliens could be continued in detention (*ibid.*) ("An alien ordered removed who is inadmissible under section [1182] may be

[20] Congressional consideration of proposals to ensure that criminal aliens who are ordered removed do not return to the community arose out of a number of legislative proposals to amend the INA, based on recommendations made by the bipartisan Commission on Immigration Reform in 1994 and 1995. The Commission was created by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, chaired by former Representative Barbara Jordan, and was required "to report to Congress with analysis and recommendations regarding the implementation of and impact of U.S. immigration policy." H.R. Rep. No. 879, 104th Cong., 2d Sess. 105-106 (1997). The Commission issued two major reports in 1994 and 1995. *Id.* at 105.

detained beyond the removal period and, if released, shall be subject to [statutory] terms of supervision.").[21]

H.R. 1915 was intended, *inter alia*, to "impose[] greater accountability for the detention and removal of aliens at the close of the hearing process," including by requiring "increased detention of aliens who are ordered removed." H.R. Rep. No. 879, *supra*, at 108. The enhanced detention requirements were based on the fact that "[t]he Inspector General of the Department of Justice ha[d] found that the vast majority of aliens who are not detained at the close of deportation proceedings abscond and are not removed from the U.S., while the vast majority of those who are detained do depart the U.S." *Ibid.*

On August 4, 1995, the bill that ultimately became IIRIRA—H.R. 2202, 104th Cong., 1st Sess.—was introduced and referred to the full Judiciary Committee to be considered in lieu of H.R. 1915. See H.R. Rep. No. 879, *supra*, at 118. On March 4, 1996, the Judiciary Committee reported the bill, as amended, to the House of Representatives. *Id.* at 120. It contained the same provisions for detention of criminal aliens that were in H.R. 1915. See H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I, at 18-19, 25-26, 234 (1996).[22] When the House

[21] H.R. 1915 also addressed detention pending removal proceedings. It provided for the detention of aggravated felons during that period unless the alien, *inter alia*, satisfied the Attorney General that he would not pose a danger to the safety of other persons or property if released and, if the alien had not been lawfully admitted, was an alien who could not be removed because the designated country of removal would not accept him and who would likely appear for future proceedings, or was an alien whose release was necessary to a major criminal investigation. H.R. 1915, *supra*, § 303, at 53-55.

[22] The Committee Report explained that the provision for detention of aliens after entry of a final removal order, or release on

considered the bill, it adopted further amendments not relevant here, and passed the bill on March 21, 1996. H.R. Rep. No. 879, *supra*, at 121; see 142 Cong. Rec. 6012-6015 (1996).

Less than one month later, however, on April 24, 1996, Congress enacted another immigration reform law, AEDPA. As noted above (see p. 32, *supra*), Section 440(c) of AEDPA amended 8 U.S.C. 1252(a)(2) (1994) to mandate the detention of aggravated felons both prior to and following the entry of a final removal order. That provision originated as Section 303(e)(3) of a Senate bill, S. 735, 104th Cong., 1st Sess. 53-54 (as engrossed in Senate on June 7, 1995). Prior to AEDPA, Section 1252(a)(2) had provided for detention of deportable aggravated felons both before and after a

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conditions to ensure their appearance, was a "significant departure from current law and practice, which often permit aliens who have final orders of deportation to remain in the U.S. indefinitely." H.R. Rep. No. 469, *supra*, at 160. The Report further explained:

> Numerous factors are cited for this failure to deport: insufficient detention space, lack of resources to apprehend aliens for deportation, and archaic procedures which provide advance notice to aliens of when they must report for deportation—a practice charitably characterized as a "run letter." H.R. 2202 specifically addresses all of these factors, by increasing detention space (including the use of closed military facilities on a pilot basis), increasing the number of interior enforcement personnel, including specifically detention and deportation officers, and, in this section, establishing procedures that will ensure that an order of removal is no longer a dead letter, but results in an actual physical removal of the alien.

Ibid. The report then emphasized, however, that the "most critical factor in lax enforcement of deportation orders" was the release of an alien after entry of a final order without assurance of the alien's availability when the INS is ready to remove him. *Ibid.* The provision for detention of aliens following entry of a final order was intended to resolve that problem. *Id.* at 160-161.

determination of deportability, unless the alien had been lawfully admitted to the United States and demonstrated to the satisfaction of the Attorney General that he was not a threat to the community and that he was likely to appear for any scheduled hearing. Section 303(e)(3) of S. 735 expanded the category of criminal aliens subject to detention under former Section 1252(a)(2) beyond aggravated felons, to include aliens convicted of other specified crimes. S. 735, *supra*, at 53-54. At the same time, it eliminated the provision allowing the Attorney General to release such aliens after expiration of the then six-month deportation period—including those aliens who had been lawfully admitted and who she determined would not pose a threat of danger to the community or flight if released. *Ibid.* During a floor debate on June 7, 1995, Senator Kennedy criticized Section 303(e) because

> it require[d] the Attorney General to detain all those in this broadened category of criminal aliens, *with no allowance for those whose home countries will not or cannot take them back.* This is the case today with Cuba, Vietnam, and Bosnia. In these cases, the Attorney General would be required to keep the alien in indefinite detention, even if the offense is relatively light and the Attorney General believes the alien would pose no danger to the community.
>
> This is a drastic and unnecessary expense to the taxpayer. It takes jail space and resources away from more pressing criminal enforcement.
>
> Under this provision, a Cuban refugee convicted of shoplifting in certain States could face life imprisonment in an INS jail.

141 Cong. Rec. 15,068 (1995) (emphasis added). Despite Senator Kennedy's objections, however, Section 303(e) was retained and ultimately enacted as Section 440(c) of AEDPA, 110 Stat. 1277.

It was against that backdrop that consideration of H.R. 2202 was revived and IIRIRA ultimately was enacted. On May 2, 1996, the Senate passed H.R. 2202, but with an amendment substituting the text of another Senate immigration bill, S. 1664, 104th Cong., 2d Sess. (1996). S. 1664 would have amended 8 U.S.C. 1252(a)(2) in a manner somewhat similar to AEDPA, by broadening the mandatory detention of deportable criminal aliens both during and after completion of deportation proceedings, and by limiting the Attorney General's authority to release such aliens to instances involving law enforcement or national security needs. S. 1664, *supra*, § 164, at 130-131 (as introduced Apr. 10, 1996). After H.R. 2202 went to conference, however, the Senate receded (with modifications) to Section 305 of the bill as it passed the House, which contained the House bill's provisions regarding detention of criminal aliens both during and after completion of the removal period. H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 215-216 (1996). See also *id.* at 210-211 (Senate receding to House bill Section 303, with modifications, which contained provisions regarding detention of criminal aliens during pendency of removal proceedings).

As modified in conference, Section 305 allowed, but did not require, the release on supervision of aliens who were ordered removed but were not removed during the removal period. H.R. Conf. Rep. No. 828, *supra*, at 53-54, 215-216. At the same time, Section 305, as modified in conference, expanded the provision in the bill allowing for detention of *inadmissible* aliens beyond the removal period to its current form that also allows for detention of certain *deportable* aliens beyond the

removal period, including aggravated felons and any alien who the Attorney General determines would pose a risk to the community or be unlikely to comply with a removal order if released. *Id.* at 54, 215-216. The Senate and the House agreed to the Conference Report and it was ultimately incorporated in an appropriations bill and signed into law on September 30, 1996. H.R. Rep. No. 879, *supra*, at 122.[23]

IIRIRA's change from the mandatory detention regime of AEDPA to a framework allowing (but not mandating) release under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) upon expiration of the removal period essentially restored the Attorney General's discretionary authority, under former 8 U.S.C. 1252(a)(2)(B) (1994), to release certain criminal aliens, including aggravated felons, from detention after expiration of the removal period if the alien does not pose a threat to the com-

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[23] Although IIRIRA Section 303(a) retained AEDPA's mandatory detention provision for criminal aliens during removal proceedings, 110 Stat. 3009-585, IIRIRA Section 303(b)(2) provided for a two-year transitional period following enactment of IIRIRA if the Attorney General determined that there was insufficient detention space and personnel to carry out that provision, 110 Stat. 3009-586. The Attorney General found that there was not adequate detention space, and the transition period custody rules provided for in Section 303(b)(2) of IIRIRA, 110 Stat. 3009-586 to 587, therefore governed pre-final-order detention during that two-year period from October 1996 to October 1998.

Although those rules governed detention pending removal proceedings and not detention beyond the removal period, which is at issue here, they nonetheless reflected Congress's intent to restrict the release of criminal aliens, specifically including an alien who "cannot be removed because the designated country of removal will not accept the alien," if the Attorney General was not satisfied that the alien would not pose a danger to the community and would likely appear for scheduled proceedings. IIRIRA § 303(b)(3)(B)(ii), 110 Stat. 3009-587.

munity or flight risk. The reasons for restoration of the Attorney General's discretionary authority over post-removal-period detention of deportable aliens are best understood in light of comments by the Department of Justice on the proposed legislation.

Shortly before H.R. 2202 was considered in conference, INS General Counsel David Martin testified before a subcommittee of the House of Representatives. Mr. Martin noted the problems that the INS was experiencing with implementation of the then-recently enacted mandatory-detention provisions of AEDPA. He then expressed the Department of Justice's strong belief that

> a better enforcement strategy would restore at least some of the flexibility previously granted to the Attorney General * * * [and would] *restore the discretion to release* certain aliens cooperating with law enforcement authorities and *others who cannot, despite INS's best efforts, be removed—provided they meet the earlier tests regarding dangerousness and flight risk. The INS fully intends to hold in custody, for as long as necessary, those who are dangerous to the community.*

Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 104th Cong., 2d Sess. 15 (1996) (emphasis added) (statement of David A. Martin). That testimony echoed the views expressed by the Department in prior correspondence to Members of Congress concerning earlier immigration proposals.[24]

[24] See Letter from Jamie S. Gorelick, Deputy Attorney General, to Henry J. Hyde, Chairman, Committee on the Judiciary 28 (Sept. 15, 1995) (criticizing the requirement in Section 305 of original H.R. 2202 that deportable aliens be released upon expiration of the 90-day removal period if they have not been removed and

explaining that "[t]he requirement that an alien be removed within 90 days ignores the many barriers that are beyond the INS' control. Obtaining travel documents is labor intensive and may take considerable time. Such delays should not prejudice diligent enforcement efforts, and the INS should not be required to release aliens after 90 days in such instances."); *id.* at 29 (recommending "that the [then-]current provisions of the INA—giving the Attorney General the discretion to detain an alien (other than an aggravated felon) after a final order and setting a six month period for removal, with an unlimited time for removal of an aggravated felon—be retained"); Letter from Jamie S. Gorelick, Deputy Attorney General, to Richard A. Gephardt, Minority Leader 31-33 (Mar. 13, 1996) (expressing same concerns about Section 305 of H.R. 2202 as reported by the House Committee on the Judiciary); Letter from Andrew Fois, Assistant Attorney General, to Robert Dole, Majority Leader 33 (Apr. 16, 1996) (expressing strong opposition to the mandatory detention requirements of Section 164 of S. 1664, as reported by the Senate Committee on the Judiciary; suggesting that, "[g]iven the limitations on habeas review of custody status," elimination of the Attorney General's discretion to release aliens who are not a flight risk or a danger to the community and imposition of a mandatory detention regime could raise serious constitutional concerns with regard to permanent resident aliens; explaining that mandatory detention provision would have "a serious adverse impact on the availability of space for the detention of both criminal and non-criminal aliens;" complaining that "[t]here is no provision for release where travel documents can not be secured"; and urging retention of provisions of then-current law that vested the Attorney General with discretion to release a lawfully admitted alien who is likely to appear for future proceedings and presents no danger to the community.); Letter from Jamie S. Gorelick, Deputy Attorney General, to Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Enclosure 5-6 (May 31, 1996) (expressing concern about the recently-enacted provision of AEDPA mandating the detention of nearly all criminal aliens, without exception, during removal proceedings and until removal, and noting the need for a "massive increase in detention resources" to meet that requirement; explaining that the AEDPA provision essentially reinstated an earlier "no-release" rule whose constitutionally had been questioned or that had been held invalid by numerous courts and had led to a 1990 amendment allowing

As noted above, Congress ultimately took the course recommended by the Department when the Senate receded to the modified versions of Sections 303 and 305 of the House-passed H.R. 2202. The legislative record establishes that the modification of Section 305 in conference to grant the Attorney General the authority to continue deportable criminal aliens in detention beyond the removal period (but not to require such detention) was the product of a compromise between the original House version of H.R. 2202, which would have required the release of such aliens upon expiration of the removal period, and the Senate version (and AEDPA), which would have mandated continued detention of such aliens. See pp. 32, 38, *supra*. The modification did not, however, mandate the release of any such aliens, including those whose countries of nationality would not accept their return[25]—particularly where the Attorney General finds that the alien poses a risk to the community. If that had been

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release of a lawfully admitted aggravated felon if he were found "not to be a threat to the community and likely to appear for hearings"; and suggesting that AEDPA invited renewal of such litigation); *id.* at 6 (recommending rejection of Section 164 of the Senate bill and adoption of Sections 303 and 305 of the House bill, which provided the Attorney General with "appropriate discretion regarding the use of detention facilities"). We have lodged copies of those letters with the Clerk of this Court.

[25] When Congress modified Section 305 to allow continued detention of deportable aliens beyond the removal period, it was well aware that certain countries have refused to accept the return of their nationals, and that such refusals could necessitate extended detention of some aliens. See, *e.g.*, IIRIRA § 307(a), 110 Stat. 3009-614 (amending 8 U.S.C. 1253(d) (1994) to authorize the Secretary of State to discontinue granting immigrant visas to citizens of a country that "denies or unreasonably delays" accepting the return of its own nationals from the United States); see also p. 26 & note 15, *supra*.

Congress's intent, it would have adopted Section 305 of H.R. 2022, either as passed by the House or with a modification that applied to a particular category of criminal aliens, such as those who could not be removed to the countries to which they had been ordered removed.

D. The Attorney General's Interpretation Of Section 1231(a)(6) Is Entitled To Deference

As we have explained, the text of Section 1231(a)(6), the structure of the relevant provisions of the INA, and the statutory history of Section 1231(a)(6) all establish that the court of appeals erred in reading into the facially unqualified text of Section 1231(a)(6) a limitation that requires the release of respondent and perhaps several thousand other criminal aliens immediately upon the expiration of the statutory removal period, without regard to whether the Attorney General has determined that they would pose a danger to the community or risk of flight if released. If there is any remaining doubt on the question, however, it is resolved by the requirement that deference is owed by the courts to the Attorney General's reasonable interpretation of the INA.

This Court has long recognized that the political Branches generally enjoy broad power over immigration, *Chae Chan Ping* v. *United States*, 130 U.S. 581, 606 (1889), and that the "power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel Mezei*, 345 U.S. 206, 210 (1953). This Court has recognized those principles in the specific context of the detention of aliens by the INS. See *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993). More recently, the Court has reaffirmed that "judicial deference to the

Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Aguirre-Aguirre*, 526 U.S. at 425.

The circumstances confronting the Attorney General when the removal of a criminal alien cannot be effectuated because of the recalcitrance of another nation raise the very type of serious questions affecting international relations and foreign policy that require such deference. The negotiations between the Executive Branch and a foreign country concerning the return of an alien, as well as to establish the logistics for accomplishing such a return, can be sensitive and difficult at times for reasons wholly unrelated to the circumstances of any particular alien. It is especially important in that situation for the judiciary to defer to the Attorney General's reasonable interpretation of the statute governing her authority over custody of the alien who has been ordered removed. A different interpretation by a court could be misinterpreted to imply that the United States believes that removal of the criminal alien is futile, contrary to the position of the United States, speaking with one voice through the Executive Branch.

It is for reasons such as these that Congress's plenary power over immigration matters and the Executive's broad powers in foreign relations give particular force in this setting to the usual requirement under general principles of administrative law and *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that deference is owed to the reasonable interpretation of an Act of Congress by the agency charged with its administration and enforcement. See *Aguirre-Aguirre*, 525 U.S. at 425; 8 U.S.C. 1103(a) (Supp. IV 1998). The Attorney General's interpretation of Section 1231(a)(6) to authorize detention of

criminal aliens in respondent's position beyond the 90-day removal period is based on the most natural reading of the plain language of the statute, as we have demonstrated above. At the very least, however, it undoubtedly constitutes a reasonable interpretation of Section 1231(a)(6), and therefore should be sustained by this Court. See *Aguirre-Aguirre*, 525 U.S. at 425.

E. The Court Of Appeals Erred In Construing Section 1231(a)(6) To Bar Detention Of Respondent In Order To Avoid What It Believed To Be A Serious Constitutional Question

1. a. Lacking any textual support for its statutory interpretation, the court of appeals invoked the canon of statutory construction that encourages avoidance of an interpretation that raises a serious doubt about the constitutionality of a statute. But the constitutional-doubt canon cannot be applied to override congressional intent. "[W]here Congress has made its intent clear, '[the Court] must give effect to that intent.'" *Miller* v. *French*, 120 S. Ct. 2246, 2253 (2000) (quoting *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962)). The constitutional-doubt canon "is not a license for the judiciary to rewrite language enacted by the legislature," *Salinas* v. *United States*, 522 U.S. 52, 59-60 (1997) (quoting *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)), and "does not give a court the prerogative to ignore the legislative will," *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 841 (1986). The court of appeals' invocation of the canon here violates those principles, for it ignores the unqualified text of Section 1231(a)(6), the structure of the INA, and the statutory history of the Act's detention provisions, as well as the Attorney General's authoritative interpretation of those provisions.

Moreover, to interpret Section 1231(a)(6) to mandate release of aliens such as respondent, based on the constitutional-doubt doctrine, would be contrary to the unambiguous intent of Congress that deportable criminal aliens such as respondent be treated the same as inadmissible aliens under Section 1231(a)(6). Section 1231(a)(6) uses the same language to grant the Attorney General authority to detain beyond the removal period aliens who are "inadmissible under section 1182" and aliens who are "removable under section * * * 1227(a)(2)." As even the court of appeals acknowledged (Pet. App. 17a-18a), there can be no suggestion that Congress intended to mandate the release of dangerous *inadmissible* aliens under Section 1231(a)(6) after expiration of the removal period. It is well established, under *Mezei*, *supra*, that an inadmissible alien (termed "excludable" at the time of *Mezei*) may be subject to long-term detention when he cannot be removed in the reasonably foreseeable future. Based on the "presum[ption] that Congress expects its statutes to be read in conformity with this Court's precedents," *United States* v. *Wells*, 519 U.S. 482, 495 (1997), Section 1231(a)(6) must be interpreted in accordance with its plain language to authorize the Attorney General to detain an alien in respondent's circumstances beyond the removal period if the alien is inadmissible. *Chi Thon Ngo* v. *INS*, 192 F.3d 390, 398 (3d Cir. 1999) (holding that Section 1231(a)(6) authorizes the Attorney General to continue to detain an excludable alien beyond the 90-day removal period even where the progress toward the alien's ultimate removal is "agonizingly slow").[26]

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[26] The Ninth Circuit in this case repeatedly limited its ruling to deportable aliens, *i.e.*, those who have "entered the United States" (Pet. App. 3a, 10a, 11a), and distinguished this case from those

Thus, an interpretation of Section 1231(a)(6) based on notions of constitutional-doubt would result in the same statutory provision being given a different meaning depending on whether a particular case involved an inadmissible alien or a deportable alien. This Court has long recognized that, when Congress uses the same language even in different parts of the same statute, it generally intends the language to have the same meaning. That rule is "at its most vigorous when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). A fortiori here, where Congress enacted a single grant of authority to the Attorney General over several categories of aliens, Congress must be understood to have intended the same language to confer the same authority with respect to each category.

b. The text of Section 1231(a)(6) also demonstrates that it is not susceptible to a constitutional-doubt interpretation analogous to that employed by the Court in *United States* v. *Witkovich*, 353 U.S. 194 (1957), on which the court of appeals relied (Pet. App. 3a, 11a, 26a). In *Witkovich*, the Court interpreted former Section 1252(d) of Title 8, which imposed conditions of supervision on an alien who was not deported within the then-applicable six-month deportation period. 8 U.S.C. 1252(d) (1952 & Supp. V 1957) (now codified in substantial ly similar form at 8 U.S.C. 1231(a)(3) (Supp. IV 1998)). The Court held that one requirement under former Section 1252(d)—that an alien under a final deportation order give information under oath as deemed proper by the Attorney General, on pain of criminal sanction—was limited to the provision of information that was reasonably calculated to keep the

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involving inadmissible aliens (*id.* at 14a-21a). See also *id.* at 31a-32a n.29.

Attorney General advised regarding the alien's continued availability for deportation (and not, in that case, information regarding the alien's involvement with the Communist Party or other organizations). 353 U.S. at 197-202. The Court interpreted former Section 1252(d) in that manner because the sole focus of that section was on ensuring the alien's continued availability for deportation and because that interpretation avoided constitutional issues that would be raised by a broader one. The Court specifically contrasted former Section 1252(d) with former Section 1252(e), 8 U.S.C. 1252(e) (1952), in which Congress expressed its intent that the Attorney General take into account broader governmental interests when determining whether certain aliens who are not removed should be released from detention, by requiring consideration of "the effect of the alien's release upon national security and the likelihood of his continued undesirable conduct." 353 U.S. at 200.

Section 1231(a)(6) is analogous to former Section 1252(e), not former Section 1252(d), because, like former Section 1252(e), Section 1231(a)(6) expressly authorizes the Attorney General to consider a factor other than the likelihood that the alien will comply with the removal order—namely, the risk the alien poses to the community—when deciding whether to continue an alien in detention beyond the removal period. In light of that text, Section 1231(a)(6) cannot be construed to authorize detention only to ensure the alien's availability for removal, and to render the alien's risk to the community irrelevant, as the court of appeals held.

2. The court of appeals' doubts about the constitutionality of Section 1231(a)(6) are in any event unfounded. The application of Section 1231(a)(6) to aliens in respondent's position fully comports with constitutional due process requirements.

The court of appeals was concerned because of what it characterized as the "indefinite" nature of respondent's detention. Pet. App. 11a, 31a. But respondent's detention was not indefinite or permanent. Although the end of respondent's detention was not demarcated by a specific event, as is an alien's detention pending removal proceedings or detention during the 90-day removal period, his detention was limited by the Attorney General's administrative review procedures. See 8 C.F.R. 241.4; Pet. App. 64a-76a, 90a-91a. Respondent's detention would have ceased when he established that he no longer posed a risk to the community, and he was afforded an ongoing opportunity to make such a showing. Also, INS's detention of respondent would necessarily cease upon his removal from this country—a matter that continues to be the subject of international negotiations (see Pet. 25 n.17). See *Zadvydas* v. *Underdown*, 185 F.3d 279, 291, 294 (5th Cir. 1999) (ruling that the alien's detention was not permanent or indefinite because the alien "may be released when it is determined that he is no longer either a threat to the community or a flight risk"; the alien is entitled to periodic review of his custody under INS administrative procedures; and it had not been clearly established that there was no meaningful possibility of locating a country that would accept the alien's removal or that removal was impossible), cert. granted, 121 S. Ct. 297 (2000).

The court of appeals was also concerned about the constitutionality of respondent's continued detention because, unlike the aliens whose long-term detention was held to be constitutional in *Mezei* and *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441 (9th Cir.), cert. denied, 516 U.S. 976 (1995), respondent is not an excludable alien. Rather, respondent is an alien who previously entered the United States (and hence is a

deportable alien) and who therefore, in the court's view, cannot be treated similarly to an excludable alien who is stopped before entering the country. The court of appeals did not adequately consider the consequences of respondent's final order of removal.

Respondent's final order of removal extinguished his status as a lawful permanent resident and eliminated any legal right he had to remain in this country. See 8 U.S.C. 1101(a)(20) (1994); 8 U.S.C. 1101(a)(47)(B)(ii) (Supp. IV 1998); 8 C.F.R. 1.1(p). Respondent's status is no longer that of an alien, like the alien in *Landon* v. *Plasencia*, 459 U.S. 21 (1982), who has developed ties to this country and hopes to be able to establish during removal proceedings that he should be allowed to remain in this country and maintain those ties. Thus, the heightened constitutional status accorded respondent as a lawful permanent resident with regard to such matters as due process protections in his removal proceedings no longer applies. *Duy Dac Ho* v. *Greene*, 204 F.3d at 1059. In respondent's circumstances, "the only act remaining to be carried out is the actual expulsion of the alien," and in such a case, "no distinction exists between the constitutional rights of former resident aliens and those of excludable aliens." *Ibid.* (citing *Zadvydas*, 185 F.3d at 294-297).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 1226 of Title 8 of the United States Code (Supp. IV 1998), provides in relevant part:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on–

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a) of

this section, rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [*sic*] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney

General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceedings. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

* * * * *

2. Section 1231(a) of Title 8 of the United States Code (Supp. IV 1998), provides in relevant part:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be

subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

(7) Employment authorization

No alien ordered removed shall be eligible to receive authorization to be employed in the United States

unless the Attorney General makes a specific finding that—

(A) the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien, or

(B) the removal of the alien is otherwise impracticable or contrary to the public interest.